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tary, and in fact is not, but is countersigned by the agent, suit should be brought on the parol agreement and not on the policy: *Peoria Ins. Co. v. Walser*, 22 Ind. 73.

By the law of Canada, the insured cannot sue at law directly for the amount of the loss upon a parol contract; his only remedy is in equity, or, perhaps, an action at law for the delivery of the policy: *Jones v. Prov. Ins. Co.*, 16 Up. Can. Q. B. 477.

If the policy when issued does not conform to the verbal agreement, there is no merger, unless under circumstances which amount to an acceptance of the policy with notice of the variance:

Humphry v. Hartford Fire Ins. Co., 15 Blatchf. 504; *Franklin Ins. Co. v. Hewitt*, 3 B. Mon. 231. And where the variance has occurred through the error of the company, equity will rectify the mistake and award full damages for the loss: *Home Ins. Co. v. Myer*, 93 Ill. 271. A court of admiralty, however, will not reform a policy of insurance. That court has no jurisdiction of the preliminary contract, out only of the perfect instrument; just as it has no jurisdiction over the contract to build a ship, though it has over the ship when built: *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason 6.

DWIGHT M. LOWREY.

Supreme Court of California.

PRATT v. WHITTIER, ET AL.

As between the vendor and vendee, the rule for determining what is a fixture is always construed strongly against the vendor.

Chattels attached to the freehold by the owner, and contributing to its value and enjoyment, pass by a grant of the freehold if the grantor has power to convey.

Parties may by express agreement fix upon chattels annexed to the realty whatever character they choose. Property which the law regards as fixtures may be by them considered as personalty, and *vice versa*: and such agreements will be enforced by the courts.

Plaintiff by deed granted to defendant the Orleans Hotel, describing it as "Lot No. 6, in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging." Plaintiff reserved in his deed the right to remove from the upper rooms of the hotel his "furniture, carpets and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." Held, that the plaintiff was not entitled to remove the gas fixtures, consisting of chandeliers; globes lettered "Orleans Hotel;" brackets, burners, pendants, &c.; a kitchen-range with boilers attached, the range resting on a brick foundation and with its attachments connected to the building by pipes; tanks and filters attached to the building by a system of pipes, nor mosquito-transoms and window-screens fitted to the windows and transoms of the hotel in the usual manner, as such articles were fixtures which passed by the deed to defendant as being essential for the purposes for which the building was formerly used. The plaintiff having reserved in his deed only the furniture, pictures and carpets of the upper rooms of the building, and none of the "permanent fixtures or appurtenances to the property," it must be presumed that the parties by their agreement considered the things in controversy as permanent fixtures and appurtenances of the hotel which were to pass by the deed.

McFarland & Edgerton, for appellant.

Freeman & Bates, for respondents.

McKEE, J.—This was an action to recover certain gas fixtures, consisting of chandeliers, globes, brackets, burners, pendants, &c., a kitchen-range with boiler attached, a patent water-filter, tanks and mosquito-screens. The property was attached to a building known as the “Orleans Hotel,” situate on a lot of land fronting on Second street, in the city of Sacramento.

As owner of the hotel, the plaintiff on October 15th 1879, contracted in writing to sell the same to the defendant, by the following description, viz. :

“Lot No. 6 in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging.” The sale was made for \$28,000 gold coin, payable after an examination and approval of the title, upon receiving from the plaintiff possession of the property and of a deed of grant of the same, on or before the first day of November 1879, reserving to the plaintiff, among other things, the right, within ten days after delivery of possession, to remove from the upper rooms of the hotel “his furniture, carpets and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed.” On the 26th of October, the defendants, having satisfied themselves about the plaintiff’s title, paid the full amount of the purchase-money and received from the plaintiff possession and a deed of grant of the property. The deed described the property the same way that it had been described in the contract of sale, and it also contained the recital that the deed had been made in pursuance of the contract of sale, and subject to the terms, conditions and reservations therein contained.

Within ten days after the delivery of possession plaintiff demanded of the defendants the privilege of removing the articles in controversy from the hotel, which, being refused, this action was instituted, and the question arises whether the articles are personalty, or fixtures which passed as appurtenances of the realty by the deed of grant.

If the question arose out of the deed alone it might not be difficult of solution, for the weight of authority seems to be in favor of the proposition that they are to be regarded as movable property, capable of being severed from the building; yet the

authorities upon the subject are conflicting. In *McKeag v. Hanover Fire Ins. Co.*, 81 N. Y. 38, the Supreme Court of New York held that gas pipes which run through the walls and under the floors of a house are permanent parts of the building; but fixtures attached to such pipes, where they are simply screwed on projections of the pipes from the walls, which can be detached by unscrewing them, are not appurtenances, and so do not pass by deed or under a mortgage of the premises, and the mere declaration of the owner that he intends that such articles shall go with the house does not make them realty.

In *Guthrie v. Jones*, 108 Mass. 193, it was held that, as between landlord and tenant, gas fixtures, though fastened to the walls, were not annexed to the realty so as to become part of it. They are, says the court, in their nature, articles of furniture, and the fact that they were fastened to the walls for safety or convenience does not deprive them of their character as personal chattels and make them a part of the realty.

In *Vaughen v. Haldeman*, 33 Penn. St. 522, the court says: "Lamps, chandeliers, candlesticks, candelabras, screens and the various contrivances for lighting houses by means of candles, oil or other fluids, have never been considered as fixtures and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures. In *Jarechi v. Philharmonic Society*, 79 Penn. St. 403, and 21 Am. Rep. 78, the case of *Vaughen v. Haldeman* was reviewed and approved. Says SHARSWOOD, J.—"Houses are considered as finished by the builders when the gas fittings are completed. The fixtures are put up in more or less expensive style, according to the tastes and means of the persons who mean to occupy them, whether as tenants or owners. If the tenant puts them in, it is not denied that, as between him and the landlord, they are his, and he may remove them or they may be sold as personal property on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is—fixtures and all—the purchaser is not entitled to them. We see then no reason for departing from the judgment in *Vaughen v. Haldeman*." To the same effect are *Shaw v. Lenke*, 1 Daly 487;

Montague v. Dent, 10 Rich. 138; *Rogers v. Crow*, 40 Mo. 91; *Lawrence v. Kemp*, 1 Duer 363; *Towne v. Fiske*, 127 Mass. 125.

On the other hand, it has been held by the Supreme Court of Kentucky, in the case of *Johnson v. Wiseman*, 4 Met. 357, that where a vendee of a house in possession purchased and put into it gas fixtures, chandeliers, &c., which were affixed by means of screws to iron pipes let into the walls of the house for the purpose of conducting gas to the burners, such chandeliers, &c., became fixtures which passed by a deed of the realty, in the absence of any express provision to the contrary, although they may be removable without injury to the walls or the ceiling of the house, or to the pipes to which they are attached. The same doctrine was enunciated in *Smith v. Commonwealth*, 14 Bush 31, as one about which there was no question. Whatever, indeed, is accessory to a building for the more convenient use and improvement of the building is considered to pass by a deed of the premises. Thus articles placed in a mill by the owner to carry out the obvious purpose for which it was erected are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere: *Parsons v. Copeland*, 38 Me. 537. In a building erected as a factory, the steam works relied on to furnish the motive power, and the works to be driven by it, are essential parts of the factory, adapted to be used with it, and would pass by a conveyance of the real estate: 4 Met. 306. Apparatus for the manufacture of gas are fixtures: *Hays v. Doane*, 3 Stock. 84. Gas burners are of the same character. They are in no sense furniture, but are mere accessories to the building: *Keeler v. Keeler*, 31 N. J. Eq. 191.

What is accessory to real estate is, according to the rule of the common law, part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture and domestic convenience; and courts recognise and enforce the right of removal by a tenant of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation, does not apply as between heir and executor, vendor and vendee. As between the latter the rule of the common law is still applicable, except so far as it may be modified by statutory regulations upon the subject. So that chattels attached to the freehold by the owner, and contributing to

its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey, *Tourtellot v. Phelps*, 4 Gray 378, and after conveyance they cannot be severed by the vendor or any one else than the owner.

As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed; and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash kettles appertaining to a building for manufacturing ashes (*Miller v. Plumb*, 6 Cowen 665); a cotton-gin fixed in its place (*Bratton v. Clawson*, 2 Strob. 478); a steam engine to drive a bark mill (*Oves v. Oglesby*, 7 Watts 106); kettles set in brick, in dyeing and print works (*Despatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 207); iron stoves fixed to the brick work of chimneys (*Goddard v. Chase*, 7 Mass. 432); wainscot work, fixed and dormant tables, engines and boilers used in a flour mill and attached to it (*Sands v. Pfeiffer*, 10 Cal. 259); a steam-engine and boiler fastened to a frame of timber, and bedded in a quartz ledge, and used for the purpose of working the ledge (*Merritt v. Judd*, 14 Cal. 59); a conduit of water-pipe to conduct water to a house (*Philbrick v. Emry*, 97 Mass. 134); hop-poles in use on a hop-farm (*Bishop v. Bishop*, 11 N. Y. 123); statues erected for ornament, though only kept in place by their own weight (*Snedeker v. Warring*, 2 Kern. 170). In fact, whatever the vendor has annexed to a building, for the more convenient use and improvement of the premises passes by his deed. The true rule deduced from all the authorities, say the Supreme Court of Virginia, seems to be this: That when the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purposes for which the building is used will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either: *Green v. Phillips*, 26 Gratt. 752; *Shelton v. Ficklin*, 32 Id. 735.

Judged by these rules, it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their nature, the circumstances under which they

were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself, by his testimony, shows that the globes were lettered "Orleans Hotel," and that they, with the chandeliers, &c, were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste-pipe which ran through the wall of the building and connected with a sewer in an alley outside, and that the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito-transoms and window-screens were fitted to the windows and transoms of the hotel—each window and transom-frame being fitted to its particular window, and shoved up and down in it on grooves, and all of them were as necessary to the hotel as its windows, its blinds and shutters. All of the articles were therefore essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, "it would not have been a hotel without them." They were, therefore, fixtures which passed by the deed of grant to the defendant, unless they were specially reserved by the deed. But the deed reserved none of the articles. It was made, according to its recitals, in pursuance of the agreement of the 15th of October, and subject to the terms, conditions and reservations therein contained and expressed.

As already stated, the agreement reserved only the furniture, pictures and carpets of the upper rooms of the building, and none of the "permanent fixtures or appurtenances to the property." In the absence from the deed of any special reservation of the articles, it must be presumed that the parties, by their agreement, considered them as permanent fixtures and appurtenances of the hotel which were to pass by the deed. It is a well-settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their

agreement, courts will enforce it: *Smith v. Waggoner*, 50 Wis. 155· 97 Mass. 279; 20 N. Y. 344; 53 Id. 377; 24 Wend. 359; 1 Hill 176; 52 N. Y. 146.

So that the plaintiff, when he contracted to sell the hotel property with its appurtenances and improvements, reserving from the sale only the carpets, furniture and pictures of the upper rooms of the building, fixed upon all the chattels which he had annexed to the hotel, and which were necessary to its use and enjoyment, the character of appurtenances and improvements of the hotel. None of them, by any possibility of construction, could fall within the reservation of "furniture, carpets or pictures in the upper rooms of the hotel."

The plaintiff, therefore, sold the articles in question as fixtures with the hotel, and as such they passed by his subsequent deed of the premises to the defendants.

Judgment and order affirmed.

As between landlord and tenant gas fixtures, so called, consisting of gas chandeliers, burners, &c., screwed upon the gas pipe in the usual way, have always been considered as the property of the tenant and removable by him. See *Lawrence v. Kemp*, 1 Duer 363; *Ex parte Morrow*, 1 Lowell's Dec. 386; s. c., 2 N. B. R. (2d ed.) 665; *Guthrie v. Jones*, 108 Mass. 191; *Seeger v. Pettit*, 77 Penn. St. 437; *Hays v. Doane*, 11 N. J. Eq. 84.

As between vendor and vendee, and mortgagor and mortgagee, the weight of authority in the United States seems to be, as stated in the principal case, that where the question is not affected by the terms of the contract between the parties, they are regarded as furniture and do not pass with the land; *Montague v. Dent*, 10 Rich. Law 135, where it was so held as between the purchaser at a mortgage sale and an execution creditor. *Vaughen v. Haldeman*, 33 Penn. St. 522; *Jarechi v. Philharmonic Society*, 79 Penn. St. 403; *Rogers v. Crow*, 40 Mo. 91; *Shaw v. Lenke*, 1 Daly 487; *McKeage v. Hanover F. Ins. Co.*, 81 N. Y. 38; *Towne v. Fiske*, 127

Mass. 125; see, also, *Lawrence v. Kemp*, 1 Duer 363; *Steuar v. Douglas*, 1870, Brown's Fixt., Appendix A.; *Funk v. Brigaldi*, 4 Daly 359. See, however, *contra*, *Johnson v. Wiseman*, 4 Met. (Ky.) 357; *Sewell v. Angerstein*, 18 L. T. (N. S.) 300, at Nisi Prius per WILLES, J., the judges of the Court of C. P. agreeing with him; *Ex parte Acton*, 4 L. T. (N. S.) 261; *Ex parte Wilson*, 2 Mont. & Ayr. 71; *Smith v. Commonwealth*, 14 Bush 31; see, also, *Ex parte Morrow*, 1 Low. Dec. 386; s. c. 2 N. B. R. (2d ed.) 665. In *Ex parte Acton*, and *Ex parte Wilson*, *supra*, the gas burners were accessory to a mill and the cases may probably be distinguished on that account.

Gas fittings (*i. e.* the pipes to which the gas fixtures are attached) as distinguished from gas fixtures, do, however, pass with the land where there is nothing in the deed to indicate a contrary intention. *Ackroyd v. Mitchell*, 3 L. T. (N. S.) 236; *Ex parte Acton*, 4 L. T. (N. S.) 261; *Ex parte Wilson*, 2 Mont. & Ayr. 61; *McKeag v. Hanover F. Ins. Co.* 81 N. Y. 38. So, also, as it seems, as to gasometers and apparatus

for generating gas ; *Hays v. Doane*, 11 N. J. Eq. 96.

Gas fixtures may also pass with the land, where it is apparent from the deed that such was the intention of the parties, and this appears to be the real ground of the decision in the principal case ; and upon this ground the decision seems correct.

The kitchen range and boilers, and the tanks and filters, would seem clearly to come within the same rule applied to the gas fixtures. Stoves set up in the usual way are, however, in the absence of terms in the deed affecting the question, generally considered as furniture, and hence do not pass with the land ; *Williams v. Bailey*, Sup. Ct. Mass., Essex, April 1801, 3 Dane's Abr. 152, sect. 25 ; *Freeland v. Southworth*, 24 Wend. 191 ; *Harris v. Haynes*, 34 Vt. 220 ; see, also, *Tuttle v. Robinson*, 33 N. H. 104. See, however, *v. Chuse*, 7 Mass. 432 ; *Smith v. Heiskell*, 1 Cranch C. C. 99 ; *Blethen v. Towle*, 19 Me. 252. See, also, *Folsom v. Moore*, Id. 252 ; *Tuttle v. Robinson*, *supra*. In the above cases, the stoves held to pass with the land were probably more or less securely annexed to the house.

As to hot-air furnaces, there is some conflict among the authorities. In *Towne v. Fiske*, 127 Mass. 125, a portable hot-air furnace, resting by its own weight upon the ground, put into a house by a person rightfully in possession under an agreement for a deed (in which case the same rule prevails, as between grantor and grantee : *McLaughlin v. Nash*, 14 Allen 136 ; *Hemenway v. Cutter*, 51 Me. 407 ; *Ogden v. Stock*, 34 Ill. 522 ; *Christian v. Dripps*, 28 Penn. St. 271 ; *Perkins v. Swanke*, 43 Miss. 349 ; *Ewell on Fixt.* 272), was held not to become a part of the realty, although connected with the house by a cold-air box, and hot-air pipes and registers in the usual manner.

On the other hand in *Stockwell v. Campbell*, 39 Conn. 362, a portable hot-

air furnace, placed by the owner of the freehold in a pit prepared for it in the cellar of the house, but not set in brick or otherwise fastened to the house or floor, but held in its place by its own weight, together with the smoke-pipe leading therefrom to the chimney, al- capable of removal without injury to themselves or the house, but intended as a permanent annexation, as appeared from the pit in the cellar, adapted to its size and depth, were held to be a part of the realty, rendering the whole house subject to a mechanic's lien, for the value thereof and the labor of setting them in the house. In *Main v. Schwarzwaelder*, 4 E. D. Smith 273, the hot-air furnace which was held to pass with the house, was so connected with the house by the owner, that to remove it, it would be necessary to take down brick-work adjoining it, and its removal would probably cause the ceiling to fall. Where the connection between a furnace put into a house by the owner of the house, is so intimate as in this case, or, as in *Stockwell v. Campbell*, it is so annexed as to appear to have been intended as a permanent annexation to the house, the better opinion would seem to be that it should be regarded as passing with the house, and not as furniture or mere personal property. In point of fact, such furnaces are believed to be generally considered as permanent accessions to the houses containing them, and not to be subject to removal as are ordinary stoves ; and hence the case of *Towne v. Fiske* would seem open to criticism upon this point.

As to the screen windows and transoms there would seem to be no doubt as to the correctness of the decision in the principal case ; and those articles would doubtless have been considered as fixtures passing with the house in the absence of words in the deed affecting the question. Having been made for, fitted to, and used with the house, they would seem to be as much a part of the house

as ordinary doors or windows. See *Pettengill v. Evans*, 5 N. H. 54; *Wistow's Case*, 14 H. 8 25, pl. 6; *Liford's Case*, 14 Vin. Abr. 3193; 11 Co. 85; *Shep. Touch.* 90; *State v. Elliot*, 11 N. H. 540; *Johnston v. Dobie*, Mor. Dict. 5443. Where, however, double windows or blinds have never been actually or constructively annexed to the house, which is complete without them, they will not pass by the conveyance of the house, though they may be secreted in the house: *Peck v. Batchelder*, 40 Vt. 233. On the whole the decision in the principal case seems satisfactory, and in accordance with established principles.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Tennessee.

W. H. CHERRY v. JOHN P. FROST ET AL.

An assignment for value, in due course of trade, of a certificate in a corporation with a blank power of attorney to transfer the stock in the books of the company passes the whole title legal and equitable.

If the pledgee of a certificate of stock so assigned as collateral security, sub-pledges the certificate for money loaned to him in ignorance of the owner's equity, the sub-pledgee will be entitled to hold the stock, as against the owner, to the extent of the consideration. Where a note is given for money borrowed at the time, secured by stock pledged as collateral, and the note is renewed at maturity, upon an extension of time, and the new note secured by a pledge of the same, or other stocks assigned with power of attorney to transfer, the payee who receives them without notice of any outstanding equity, takes them in due course of trade free from such equity.

If the holders of a note, secured by stock as collaterals, after the contract has been closed, exchange any of the collaterals with the makers of the notes for other stocks of equal value, he would take the latter as security for a pre-existing debt, but would be a purchaser of them to the extent of the consideration given in exchange.

At the time a certificate of stock was wrongfully sub-pledged, only a part of the stock was paid up, the corporation then holding the note of the stockholder for the residue payable on call, and the stockholders afterwards made a payment on the stock, and gave a negotiable note on the residue, *Held*, that the sub-pledgee could only claim, as against the owner, the proportion of the stock paid up at the time he received the certificate.

IN November 1871, the complainant Cherry borrowed from the City Bank of Memphis \$1000, for which he gave his note, due on demand, and at the same time deposited with the bank, as collateral security, a certificate of forty shares, of \$100 each, of the capital stock of the Mississippi Valley Insurance Company. The certificate was, by its face, "transferable in person or by attorney on surrender of this certificate." On the back of the certificate was an assignment for value and the printed form of a power of attor-